FILE COPY

OFFICE SUPREME COURT, U. S.
FILED
OCT 30 1930
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930.

No. 16.

STATE OF FLORIDA AND A. S. WELLS, E. S. MATHEWS, ET AL., APPELLANTS,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

No. 17.

BROOKS-SCANLON CORPORATION, WILSON CYPRESS COMPANY, AND CUMMER CYPRESS COMPANY, APPELLANTS,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

No. 18.

WILSON LUMBER COMPANY OF FLORIDA, APPELLANT,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

MEMORANDUM ON DISCRIMINATION.

F. B. GRIER,
CARL H. DAVIS,
W. E. KAY,
ROBERT C. ALSTON,
Attorneys for Atlantic Coast Line R. R. Co.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 16.

STATE OF FLORIDA AND A. S. WELLS, E. S. MATHEWS, ET AL., APPELLANTS,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

No. 17.

BROOKS-SCANLON CORPORATION, WILSON CYPRESS COMPANY, AND CUMMER CYPRESS COMPANY, APPELLANTS,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

No. 18.

WILSON LUMBER COMPANY OF FLORIDA, APPELLANT,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

MEMORANDUM ON DISCRIMINATION.

The Minnesota Rate Cases (230 U. S. 352) mark an expression of the development of the law, as stated in

Gibbons *vs.* Ogden, 9 Wheat. 1, applied to the highly developed commerce of the present day. The court there divided the subject into that action of the State which imposes a direct burden upon interstate commerce and that action of the State which conflicts with the provisions of the Act to Regulate Commerce. It there clearly set apart interstate commerce as a unit upon which burdens may be placed by the action of a state and for the removal of which burden the Federal Government has ample power. The court also determined that matters which fall within the state power are also by reason of their relation to interstate commerce within the reach of the Federal power and that Congress must be the judge of the necessity of Federal action, and that the action of the state in dealing with internal commerce, which undertakes to regulate instrumentalities which are also used in interstate commerce, is necessarily subject to the exercise by Congress of its authority to control such instrumentalities so far as may be necessary for the purpose of enabling it to discharge its constitutional functions.

The Shreveport case, 234 U. S. 342, applied the doctrine of the Minnesota case to practically the same conditions as in the Minnesota case, except that Congress, through the Interstate Commerce Commission, had in the Shreveport case exercised its power and had declared that the action of the State constituted discrimination against interstate commerce. Then the Government, declaring that wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control

of the other it is Congress and not the State that is entitled to prescribe the final and dominant rule, set aside and held for naught the action of the State government in doing that which the Interstate Commerce Commission had determined was a discrimination against interstate commerce. That decision also declared "that the power to deal with the relation between the two kinds of rates, as a relation, lies exclusively with Congress". The court also discussed the discrimination which is prohibited by Section 3 of the Act; that discrimination being "any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever". The court declared that this language was "certainly sweeping enough to embrace all the discriminations of the sort described which it was within the power of Congress to condemn; and also declared that "there is no exception or qualification with respect to an unreasonable discrimination against interstate traffic produced by the relation of intrastate to interstate rates as maintained by the carrier".

The next development came with the adoption of the Federal Control Act by Congress, March ~~21, 1918,~~ 1920 and with it the amendments to the Interstate Commerce Act, especially those parts thereof which find expres-

sion in Sections 13 and 15*a*; the latter requiring the Commission from time to time to determine and make public what percentage of the aggregate property value of the railroads constitutes a fair return thereof, and to establish the rates so that the carriers as a whole (or as a whole in each of the rate groups or territories) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, etc., earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers.

Section 13 gave to the Commission the express statutory power to remedy any rate, fare, charge, classification, regulation or practice as to intrastate business which causes any undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate or foreign commerce, on the other; or any undue, unreasonable or unjust discrimination against interstate or foreign commerce; and also gave it power to prescribe such rates, regulations and practices as in its judgment would remove such advantage, preferance, prejudice or discrimination.

We know that the purpose of this Act was to put into statutory power and to prescribe procedure for its exercise that power which the Supreme Court has recognized to be in the Commission in the Shreveport case. (See Board of Railroad Commissioners *vs.* Great Northern Railway, 281 U. S. 412, 426.) The committee reporting that bill to the House stated that

"we have incorporated into law the decision of the court".

It is plain from the historical circumstances, as well as from the official declarations of the Chairman of the Committee on Interstate and Foreign Commerce of the House of Representatives when presenting the bill, that one of the discriminations intended to be relieved was that worked by "the low level of the intrastate rates" as compared with the higher level of interstate rates. Expressions to the same effect were made in the Senate.

The Wisconsin case and the New York case, 257 U. S. 563 and 591, made declaration of the purpose of the amendments of 1920 to give the Commission the statutory power to cure discriminations not only against persons, localities, particular descriptions of traffic, etc., but against the unit interstate commerce. That purpose, finding direct expression in the Wisconsin case, is but a restatement of the same principle in the Minnesota case, to which reference has been above made.

The same thought is expressed in the New York case at page 601 of 257 U. S., as follows:

> "If the lower level of intrastate fares and rates is to be maintained, it will discriminate against interstate commerce, in that it will require higher fares and rates in the interstate commerce of the State to secure the income from which the Interstate Commerce Commission must attempt to provide by fixing rates under Section 15*a* of the Interstate Commerce Act, as amended by § 422 of the Transportation Act of

> 1920, 41 Stat. 456, 488, in carrying out the declared congressional purpose 'to provide the people of the United States with adequate transportation'. As we have just held in the Wisconsin Rate Case, this constituted 'undue, unreasonable, or unjust discrimination against interstate commerce'."

This latter expression is but a reincarnation of that part of the Shreveport case (234 U. S. 354) which declares:

> "It is immaterial, so far as the protecting power of Congress is concerned, that the discrimination arises from intrastate rates as compared with interstate rates. The use of the instrument of interstate commerce in a discriminatory manner so as to inflict injury upon that commerce, or some part thereof, furnishes abundant ground for Federal intervention."

The "instrument" of interstate commerce is the interstate carrier and "where this evil consists in the action of an interstate carrier in unreasonable discrimination against interstate traffic over its line, the authority of Congress to prevent it is equally clear".

We follow this up with the New England Divisions Case, 261 U. S. 184, which holds that the Commission in establishing divisions of joint rates is authorized to consider "not only what is just and reasonable and equitable as between all the carriers participating, but also the financial needs of particular carriers which should be supplied in the public interest, in order to maintain them in effective operation as part of the adequate transportation system".

We find the same thought expressed in U. S. *vs.* Illinois Central, 263 U. S. 515, 525, where the court holds that the interest of the individual carrier must yield in many respects to the public need; and the newly conferred power to grant relief against rates unreasonably low may afford protection against injurious rate policies of a competitor which were theretofore uncontrollable.

We find the same principle reuttered in Dayton-Goose Creek Ry. *vs.* U. S., 263 U. S. 456, 485, when the court declares that:

> "When the adequate maintenance of interstate commerce involves and makes necessary on this account the incidental and partial control of intrastate commerce, the power to exercise such control has been clearly established."

This case confirmed the right of recapture of excess earnings, all for the purpose of making a better system of interstate carriage.

The District Court in Wallower *vs.* U. S., 32 Fed. (2d) 524, 526, declared the effect of the amendments to the Interstate Commerce Act, wrought by the Transportation Act, as follows:

> "By the Transportation Act of 1920 the powers of the Interstate Commerce Commission were greatly broadened. Therefore their duties were largely negative, to prevent discrimination, unfair practices, unreasonable rates, and improper capitalization. By the amendment their duties became affirmative—to maintain adequate transportation service; to foster weak lines; to protect against ruinous competition."

This is but a condensation of expressions from the Supreme Court.

The individual carrier, while still an object of protection and regulation by the Commission and the courts, has become, within the meaning and purposes of the Interstate Commerce Act, a part of a group, and its individual interest is to be considered in its connection with its group, to the end that the Nation may have an efficient transportation system. The earning capacity and the financial resources of the individual carrier have now become a matter of national concern (270 U. S. 277). On the same basis follow the cases which deal with abandonment of lines, the taking on of new lines, and the issuance of new securities and building into competitive fields.

Preference or advantage and prejudice and disadvantage take on now their meaning consistent with the purposes of the Act as amended, for, of course, the amendments are to be read with the old part of the Act and the old part with the amendments. Giving to the log traffic an unduly low rate in intrastate commerce is an advantage to that particular description of traffic. It makes a disadvantage and a preference against other classes of traffic, including interstate commerce. The performance of that service on the rates involved requires the making up from other classes of traffic those earnings which are essential to the railroad in making the earnings contemplated under Section 15*a* as necessary to make "a fair return on the aggregate value of the railway proper".

In addition to that, the rates for interstate earnings are fixed by the Interstate Commerce Commission.

They are fixed in this proceeding; they are in harmony with the other state and intrastate earnings on the same commodity in the same general territory; they are wholly out of harmony with those rates fixed in this proceeding and accepted by shippers and carriers and by the Georgia Public Service Commission. Congress has exerted its power through its instrument, the Interstate Commerce Commission; that has been done on abundant evidence; it not only justifies the finding of the Commission, but compels it.

The rate thus established by the Commission was at least a *prima facie* standard for testing the reasonableness of the rate under investigation.

L. & N. Railroad *vs.* U. S., 238 U. S. 2.

The comparisons do not rest alone upon rates fixed by the Commission in this proceeding, but upon rates fixed by it in other proceedings for like territory.

The record shows the points of origin of the large shipments of logs in Florida; the points of destination and the rates; the quantity of timber that is standing in each tract. It shows the interstate rates on corresponding movements and it shows that the average load per car of timber is about 4,200 feet and it shows the number of board feet in the average car from each shipping point. With these quantities at hand it is easy to ascertain the gross amount of revenue that will be collected by the Atlantic Coast Line under the Cummer scale of rates and the revenue which will be collected on the same movements if rates equal to the interstate scale had been collected. Thus it can be

very easily ascertained that the revenue on shipments moving from the Hines section and from Otter Creek, Homosassa, and Withlacoochee River, and from Perry and Carbur, will amount to $6,324,271.00. That is by no means all the revenue to be affected, but it is sufficient to show that the revenue involved is enormous.

Transportation Conditions in Southern Territory.

The Commission in Southern Class Rate Investigation, 113 I. C. C., 200, 205 (July 19, 1926), determined that "transportation conditions are so similar throughout southern territory, with the exception of the Florida Peninsula, that one level of class rates should prevail."

The Commission stated in North Carolina Pine Association vs. A. C. L. Ry. Co., 85 I. C. C. 270, 296 (December, 1923), that the Florida Peninsula south of the line of the Seaboard Air Line extending from Jacksonville to River Junction is divided into five zones. These zones carried graduated rates in excess of the Georgia main line rates over the Atlantic Coast Line.

Respectfully submitted,

F. B. GRIER,
CARL H. DAVIS,
W. E. KAY,
ROBERT C. ALSTON,
Attorneys for Atlantic Coast Line R. R. Co.